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October 9, 2003

Honorable James S. Jochum
Assistant Secretary for Import Administration
U.S. Department of Commerce
Pennsylvania Avenue and 14th Street, N.W.
Washington, D.C. 20230

Re: ***Comments of Instituto Brasileiro de Siderugica***
On the Appropriateness of Deducting Section 201 Duties from the
Export Price in Antidumping Margin Calculations

Dear Mr. Jochum:

On behalf of the Instituto Brasileiro de Siderugica ("IBS), enclosed please find comments on the appropriateness of deducting countervailing (CVD) and Section 201 duties from the export price in antidumping margin calculations.

The enclosed comments are submitted in response to the Department's Request for Public Comments that was published in the *Federal Register* on September 9, 2003.

The comments are provided in the attached paper. In accordance with the Department's request, we also enclose a 3.5" diskette containing IBS' comments.

Please do not hesitate to contact the undersigned should you have any questions concerning the enclosed comments.

Respectfully submitted,

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Before the United States Commerce Department
International Trade Administration

Comments of Instituto Brasileiro de Siderugica On the Propriety of Deducting CVD and Section 201 Duties in Antidumping Margin Calculations

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Introduction and Summary

This submission provides the comments of Instituto Brasileiro de Siderugica ("IBS") on the appropriateness of deducting countervailing (anti-subsidy) and Section 201 duties in antidumping duty calculations. The Comments are submitted in response to the Request for Public Comments issued by the Department of Commerce on September 3, 2003.[1] IBS appreciates the opportunity to submit comments on this important issue.

In this paper, IBS makes the following essential points:

- The Department has a long-standing practice of refusing to deduct CVD duties from the export in antidumping calculations, and such practice has been explicitly approved by the Courts. There has been no change in law or fact to compel reconsideration of this long-standing practice.
- Given their special nature, Section 201 duties cannot be considered normal U.S. customs duties.
- Section 201 duties are neither a selling expense nor a cost incident to bringing merchandise to the United States.
- There are important policy reasons for not deducting Section 201 duties in antidumping margin calculations. Deducting Section 201 duties in AD margin calculations would significantly exacerbate the effect of 201 duties by extending Safeguard Measures beyond both the amount and time determined by the President to be necessary to facilitate the domestic industry's adjustment to import competition.

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1 *See Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties*, 68 Fed. Reg. 53104 (September 9, 2003) (hereinafter "*Request for Comments*").

I. The Department Should Not Change Its Long-Standing (and Court Approved) Practice of Not Deducting Countervailing Duties In The Calculation of Antidumping Margins

IBS is rather surprised that the Department is seeking comments on the "appropriate treatment" of countervailing duties in antidumping calculations. The rationale cited by the Department for seeking comments was that "several parties have advocated that the Department deduct countervailing duties" from export price (and constructed export price) when calculating antidumping margins. However, many parties have advocated this very position in the past, and the Department has consistently rejected it.

Indeed, several years ago, in a 1997 case, *Certain Cut-to-Length Carbon Steel Plate Germany*, 62 Fed. Reg. 18390 (April 15, 1997), the Department all but chastised the petitioners for wasting the Department's time by submitting arguments on this issue; an issue that the Department considered had long been resolved. In that case, the Department unequivocally stated the following:

> It is the Department's ***longstanding position*** that AD and ***CVD duties are not a cost*** within the meaning of section 772(d). AD and CVD duties are unique. Unlike normal duties, which are an assessment against value, AD and CVD duties derive from the margin of dumping or the rate of subsidization found. Logically, AD and CVD duties cannot be part of the very calculation from which they are derived. This logical rationale for the Department's interpretation of the statute is consistent with prior decisions of the CIT. See Federal-Mogul, supra, 813 F. Supp. at 872 (deposits of antidumping duties should not be deducted from USP because such deposits are not analogous to deposits of "normal import duties").
>
> . . .
>
> Moreover, the treatment of AD and CVD duties (already paid or to be assessed) as a cost to be deducted from the export price is an issue that was arduously debated during passage of the URAA and ultimately rejected by Congress. See H.R. 2528, 103rd Cong., 1st Sess. (1993). Alternatively, Congress directed the Department to investigate, in certain circumstances, whether AD duties were being absorbed by affiliated U.S. importers. 19 U.S.C. 1675(a)(4). ***Thus, Congress put to rest the issue of AD and CVD duties as a cost***. SAA at 885 ("The duty absorption inquiry would not affect the calculation of margins in administrative reviews.") *See also* H. Rep. No. 103-826(I), 103rd Cong., 2nd Sess. 60 (1994).

Id. at 18395 (emphasis added).

This Department position has been expressly affirmed by the Courts, with respect to *both* AD duties *and CVD duties*. Indeed, in the appeal of the very determination noted above, the domestic industry argued at great length that CVD duties imposed to offset *domestic* subsidies were different from AD duties, and therefore the DOC rationale for not deducting them in the AD margin calculation did not apply. The Court specifically and unequivocally rejected this argument:

> Domestic Producers respond expressly for the first time in their reply brief that Commerce's rationale does not apply to the treatment of countervailing duties imposed to offset non-export subsidies. The Domestic Producers assert that domestic subsidies are not presumed to have any particular price effect, and are not presumed to have equal price effects in the home and U.S. markets. Accordingly, Domestic Producers argue that Commerce has failed to demonstrate that the deduction of non-export CVD duties from U.S. price would result in a double remedy or an impermissible double-counting.
>
> The court has upheld Commerce's interpretation that countervailing duties should not be deducted from U.S. price, based on Commerce's position against double-counting. See *AK Steel*, 988 F. Supp. at 607-08. Domestic Producers ask the court to make a narrow exception to this general rule and find that Commerce's interpretation and rationale are unreasonable as applied to the deduction of countervailing duties designed to offset non-export subsidies.
>
> Based on the information presented, ***the distinction that Domestic Producers attempt to make between the export and non-export countervailing duties is not a viable one***. The double counting concern is still relevant if Commerce decides to deduct non-export countervailing duties. Logically, the deduction of a countervailing duty, whether export or non-export, from the U.S. price used to calculate the antidumping margin would result in a double remedy for the domestic industry. ***Commerce has already corrected for the subsidies on the subject merchandise*** *in the countervailing duty order, thereby granting the domestic industry a remedy. To deduct such countervailing duties from U.S. price would create a greater dumping margin, in effect a second remedy for the domestic industry.* Therefore, Commerce's rationale for not deducting countervailing duties is reasonable as applied to both export and non-export countervailing duties.

U.S. Steel Group. vs. United States, 15 F. Supp. 2d 892 (Ct Int'l Trade 1998)

Given that the Department has a long-established practice of not deducting CVD duties from the export price in AD margin calculations, and given that such practice has been expressly

approved by the Court, the question then is has there been any change in the underlying law, or underlying factual circumstances, that should cause the Department to reconsider its long-established position (and court approved) on this issue. The answer is no. There has been no change to the statute that would compel, or even encourage, the Department to change its position.

Nor has there been any change in facts. When the Department strongly reaffirmed its position against deducting CVD duties in 1997 the Department was faced with concurrent AD and CVD cases, just as it is faced with similar cases now. There has been no change in the type of cases brought that would suggest that the Department should reevaluate its long-standing practice.

Given the complete absence of a change in law or a change in facts, there is no legitimate reason for the Department to abandon its long-standing practice.

II. The Department's Preliminary Decision Concerning Deducting Section 201 Duties Should Be Adopted.

The issue of whether Section 201 duties should be deducted from U.S. price in calculating the antidumping margin for specific entries arose in the context of *Steel Wire Rod from Trinidad and Tobago*.[2] In that case, the Department issued what was essentially a preliminary determination in the form of a Recommendation Memorandum in favor of NOT deducting Section 201 duties. Although the Department declined to decide the issue in its final

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[2] *See* Memorandum to Faryar Shirzad, Assistant Secretary for Import Administration, from Bernard T. Carreau, Deputy Assistant Secretary for AD/CVD Enforcement II, in Case No. A-274-804, Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago (hereinafter "Final Decision Memorandum").

determination because of the potential impact on other cases,[3] the Department's preliminary determination is well reasoned, arrives at the correct result, and should be adopted.

In the Recommendation Memorandum, the Department noted that it has a consistent, longstanding practice of not deducting AD duties from the export price ("EP") or the constructed export price ("CEP")[4] and that this practice has been approved by the Court of International Trade.[5] The Department also found that the rationale for NOT deducting AD duties supports a NON-deduction practice for Section 201 duties. Specifically, the Department found that neither the statute nor any policy consideration required such a deduction.

III. The Statute Does Not Mandate A Deduction of Section 201 Duties

By law, the Department is required to deduct certain costs and expenses from the Export Price or Constructed Export Price of the subject merchandise. Specifically, Section 772(c) of the Trade Act of 1930, as amended (19 U.S.C. § 1677a(c)(2)), provides:

> **(c) Adjustments for export price and constructed export price**
>
> The price used to establish export price and constructed export price shall be--
>
> . . . .
>
> (2) reduced by--
>
> (A) except as provided in paragraph (1)(C), the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from

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3 *See* Final Decision Memorandum at 4 *citing* 19 U.S.C. § 1677f 1(a)(2).

4 *See* Recommendation Memorandum at 2.

5 Id. at 3, *citing Hoogovens Staal v. United States*, 4 F.Supp. 2d 1213 (Ct. Int'l Trade 1998) and *Bethlehem Steel v. United States*, 27 F. Supp. 2d 201 (Ct. Int'l Trade 1998).

> the original place of shipment in the exporting country to the place of delivery in the United States.

In light of this language and past Department practice dealing with the deductibility of AD duties, the first issue to consider is whether Section 201 duties should be considered a "United States import duty" within the meaning of the statute. Although the term "United States import duties" first appeared in section 203 of the 1921 Act (42 Stat. 12), neither the 1921 Act nor its legislative history defined the term.[6] However, it is clear from the legislative history that Congress considers United States import duties and antidumping duties distinct. For example, the Senate Report accompanying the legislation consistently refers to antidumping duties as "special dumping dut[ies]" and consistently refers to ordinary customs duties as "United States import duties." This deliberate maintenance of distinct terms indicates that Congress intended the new "special dumping duties" (payable only to offset dumping) to be considered different from the existing "United States import duties." [7]

It is "black letter law" that because the statute does not define the term "United States import duties" or "costs, charges or expenses" which are incident to bringing the merchandise to the United States," the Department has the discretion to define these terms. That discretion, however, is limited to definitions based on a permissible construction of the statute.[8] In this regard, the Department has long interpreted, and properly interpreted, "United States import duties" to mean "normal import duties" which do not include special duties applied to offset

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6 *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews,* 62 Fed. Reg. 18404 (April 15, 1997).

7 *Id.*

8 *See Hoogovens Staal*, 4. F. Supp. 2d at 1220; see *also AK Steel Corp. v. United States*, 21 C.I.T. 1265; 1279, 988 F. Supp. 594, 607 (Ct. Int'l Trade 1997).

particular trade situations. Indeed, the Department has taken the position before the courts that that Section 772(c) of the Act requires the deduction of "normal import duties" and that cash deposits of estimate antidumping duties are not normal import duties. More importantly, the courts have agreed with this interpretation.[9] In another example, the Department's Recommendation Memorandum in the *Wire Rod* case frames the deductibility analysis in terms of whether Section 201 duties should be considered "normal import duties."

A. Section 201 Duties Are Distinct From "Normal Import Duties"

Section 201 duties are an extraordinary remedial device intended to facilitate the domestic industry's adjustment to import competition.[10] The very process by which such duties are determined and applied makes them different from normal customs duties. Whereas Normal import duties are statutory *ad valorem* rates of general application,[11] Section 201 duties are based on a finding by the U.S. International Trade Commission ("ITC") that an industry in the United States is experiencing or is otherwise threatened with serious injury due to increased imports. The latter represents a determination of the amount of duties necessary to "facilitate efforts … to make a positive adjustment to import competition"[12] based on specific guidelines for calculating the duty rates. The duties as implemented represent a finding by the President as to the level of protection from import competition that is warranted and in the public interest.

As the Department noted in the *Wire Rod* Recommendation Memorandum, the fact that Section 201 duties are remedial in nature make them similar to AD and CVD duties.

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[9] *See, e.g., Federal Mogul Corporation v. United States*, 17 C.I.T. 88; 813 F. Supp. 856, 872 (Ct. Int'l Trade 1993).

[10] *See* 19 U.S.C. § 2253(a)(1)(A).

[11] *See* 19 U.S.C. §§ 1202 and 3004.

[12] *See* 19 U.S.C. § 2253(a)(1)(A).

Specifically, the Department found that "just as antidumping duties derive from a special calculation of price discrimination, Section 201 duties derive from a special calculation of the amount necessary to 'facilitate efforts to make a positive adjustment to import competition.'"[13]

The remedial nature of Section 201 duties is also apparent from the fact that they may be applied to duty free merchandise. The Department concedes that the ability to apply antidumping duties to "duty-free" merchandise renders them outside the realm of "normal customs duties."[14] The fact that Section 201 duties can be applied to "duty-free merchandise" also evidences their special, remedial purpose, which makes them different than normal import duties.

The continued U.S. statutory distinction between normal import duties and Section 201 duties has been maintained by Congress in the most recent legislation implementing the results of multilateral trade negotiations. Under the Uruguay Round Agreements Act of 1994, Congress, following the form and structure of the GATT 1994, separated "Tariff Modifications" (Title I, Subtitle B, Section III), which contained the negotiated duty rates for normal import duties from Safeguard Measures, or "import restrictions" (Title III, Subtitle A). It seems apparent that if Safeguard Measures were ordinary, albeit temporary tariff modifications, they would logically fall within the purview of Section III on "Tariff Modifications."[15] But because

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[13] Recommendation Memorandum at 3.

[14] In distinguishing antidumping duties from normal customs duties, the Department referred to section 202(a) of the Tariff Act of 1921, which "provided that 'special dumping duties' may be applied to 'duty-free merchandise.'" *See Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews*, 62 Fed. Reg. 18404 (April 15, 1997).

[15] This section defines the President's authority to increase or reduce tariffs "as he determines to be necessary or appropriate to carry out U.S. Schedule XX annexed to the Marrakesh Protocol to GATT 1994 (*i.e.*, the U.S. schedule of tariff concessions.)." 103rd Congress S. Rpt. 103-412 at 17 (1994).

Section 201 duties are in purpose and definition not "normal" customs duties and were not listed on the U.S. schedule of tariff concessions, they were instead covered under Title III of URAA.

Similarly, Section 201 duties do not appear in Chapters 1-97 of the Harmonized Tariff Schedules of the United States ("HTSUS"). Instead, they are listed as additional rates in a separate schedule for temporary legislation, temporary modifications proclaimed pursuant to trade agreements legislation, and additional import restrictions proclaimed pursuant to Section 22 of the Agricultural Adjustment Act.[16]

By all accounts, whether based on Congressional intent as revealed by legislative history, Department practice, distinctions in the mechanics and purpose of normal import duties and Section 201 duties, or legislative construction, Section 201 duties are not normal import duties. They are not "United States import duties" within the meaning of the statute. Therefore, the statute does not require that Section 201 duties be deducted in calculating U.S. price (EP or CEP).

B. Section 201 Duties Are Not Selling Expenses Or Additional Costs, Incident To Bringing Subject Merchandise To The United States

The statute directs the Department to deduct certain costs and expenses in AD calculations. In determining EP or CEP, the Department is to deduct the amount "attributable to any additional costs, charges, or expenses . . . incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States."[17] In contrast, Section 201 duties are not "additional costs, charges or expenses" incident

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[16] *See* Chapter 99, Harmonized Tariff Schedule of the United States (2003), Supplement 1 (July 1, 2003).

[17] 19 U.S.C. § 1677a(c)(2).

to importing the merchandise to the United States. Section 201 duties, therefore, should not be deducted from the U.S. price in calculating AD margins.

A common sense reading of the statute and the context in which it was established makes clear that the intent of the language of "costs...incident to importing" is to cover charges necessary to transport the merchandise, such as port charges, ocean freight and insurance, and handling costs. It was never intended to cover extraneous charges, such as special duties, which are imposed by the U.S. government upon entry of the merchandise into the United States as a remedial trade measure.

IV. Deducting Section 201 Duties From AD Margin Calculations Would Conflict With The Statutory Purpose Of Section 201

There are important policy reasons for not deducting Section 201 duties from U.S. price in a dumping calculation. Deducting Section 201 duties in AD margin calculations would dramatically increase the effect of 201 duties and therefore would upset the careful balance between costs and benefits inherent the President's decision to impose Section 201 duties. This is a non-trivial matter and portends a potential conflict with the statutory purpose of Section 201.

The remedial purpose underlying Section 201 of the statute is to impose only that level of duties necessary "to make a positive adjustment to import competition."[18] The statute specifically requires that the level of duties be measured so that they provide greater economic and social benefits than costs.[19] Thus, when a Presidential Proclamation establishing Section

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[18] *See* 19 U.S. C. § 2253(a)(1)(A).

[19] *Id*.

201 duties is issued, the President has made a determination of the precise amounts necessary to effectuate the statutory purpose.

A. Deducting 201 Duties Would Substantially Increase The Amount Of Total Duties Charged

Deducting Section 201 duties from U.S. price in AD margin calculations would substantially increase the effective rate of duty imposed on those foreign exporters that are subject to both antidumping and Section 201 duties, as illustrated below:

AD Margin w/o 201 Deduction
(assuming 30% 201 duties)

HM Invoice Price	100	U.S. Invoice Price	110
HM distribution costs	4	US distribution costs	7
HM selling expenses	6	U.S. selling expenses	5
		U.S. customs duties	2
Adjusted HM price	90	Adjusted U.S. Price	96
AD margin =	-6	(*no dumping*)	
AD duty rate =	0%		
201 duty rate	30%		
Total (201 plus AD)	**30%**		

AD Margin with 201 Deduction
(assuming 30% 201 duties)

HM Invoice Price	100	U.S. Invoice Price	110
HM distribution costs	4	US distribution costs	7
HM selling expenses	6	U.S. selling expenses	5
		U.S. customs duties	2
		201 duties	30
Adjusted HM price	90	Adjusted U.S. Price	66
AD margin =	24		
AD duty rate (24/66) =	36.3%		
201 duty rate	30%		
Total (201 plus AD)	**66.3%**		

The table above illustrates two scenarios. The first involves a situation in which the "normal" dumping rate using the Department's usual calculation methodology would result in a zero dumping margin. In this case, the importer would pay Section 201 duties of 30 percent at the time of importation, and when the entries were liquidated, the importer would not be liable for any AD duties.

In contrast, if the Section 201 duties are deducted in the AD calculation (as depicted in the second scenario), the AD duty rate becomes 36%. In other words, even though the importer paid 30 percent Section 201 duties when the merchandise was imported, the importer would still pay an *additional 36 percent* in AD duties when the entries were liquidated because of the deduction of the Section 201 duties. This additional 36 percent is in fact a punitive rate directly related to the Section 201 duties and, as mentioned earlier, exceeds the statutory purpose and the President's own Proclamation to effect a Section 201 remedy only to the extent necessary to facilitate adjustment to imports competition.

B. Deducting 201 Duties In AD Margin Calculations Would Prolong The Effect Of 201 Restraints Beyond Three Years

Deduction of 201 duties in this manner would not only **dramatically increase the amount** of duties collected, but **also** would **significantly prolong the time** the 201 duties would affect U.S. prices. Specifically, the retrospective nature of the U.S. AD regime means that changes in AD cash deposit rates are not made until long after the entries of the merchandise are made. This can be seen by assuming (for illustration purposes) that an AD review period corresponded exactly to the annual period for the steel Section 201 duties, as detailed in the chart below.

Schedule of 201 Duties and Antidumping Review	
Last year of 201 duties	April 1, 2004 – March 31, 2005
AD review initiated	April 2005
AD review final determination	April 2006 (high AD rate because 201 duties deducted)
Subsequent AD review period	April 1, 2005 - March 31, 2006
Subsequent AD review final determination	April 2007 (lower rate because no 201 deduction)

Under U.S. law, cash deposit rates can only be changed upon completion of an AD administrative review by the Commerce Department. Accordingly, as shown above, even though the 201 duties are scheduled to be terminated by March 31, 2005, their adverse effect -- through their incorporation in an increased AD duty rate -- would last until April 2007 -- a full two years later. Again, this reflects a potential conflict with Section 201, which establishes specific limitations on the duration of a 201 remedy.[20]

C. Deducting 201 Duties In AD Margin Calculations Would Create Added, Unintended Differences Among Section 201 Relief Options

Under Section 201, if relief in the form of trade restraints is determined to be appropriate, the President has the option of establishing quotas or imposing additional duties (or a combination of the two, called a tariff-rate quota.) As a practical matter, it would be virtually impossible for the Department to adjust EP or CEP to take into account a quota that had imposed as 201 relief.

Given that the underlying purpose of Section 201 relief is always the same (time for the domestic industry to adjust), the idea that certain types of 201 relief (i.e. when duties are imposed) be taken into account in the antidumping calculation when other types of relief (i.e.

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[20] *See* 19 U.S.C. § 2253(e)(1).

quotas) are not is not logical. There is no persuasive basis to treat Section 201 relief differently from one case to the next.

Deducting Section 201 duties in AD margin calculations would only exacerbate the effect of the Section 201 duties by extending Safeguard Measures beyond both the amount and time determined by the President to be appropriate to facilitate the domestic industry's adjustment to import competition without unduly burdening consumers or other aspects of the economy. This is not in accord with the purpose or mandate of the Section 201 statute. Therefore, Section 201 duties should not be deducted in AD calculations.

V. Any Change In Policy Should Apply Only To Prospective Entries

If the Department still determines that it should deduct Section 201 duties in its AD calculations, the Department should implement this change only with respect to sales that occur after the announcement of the policy. Companies cannot be subjected to dumping liability based on a calculation methodology about which they had no knowledge at the time sales of the subject merchandise are made. Immediate application of a new calculation methodology to ongoing investigations and administrative reviews would be manifestly unfair and punitive.

The purpose of the antidumping law is not to punish. Rather, the antidumping law is intended to remedy a perceived imbalance in competition. Application of the proposed change in policy to ongoing investigations and administrative reviews would do nothing to remedy the imbalance and would instead only punish unwitting companies.